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No. 84-1362

Supreme Court, U.S.
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IN THE

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY OF MARYLAND,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether a state utility regulatory commission is a "person" who is subject to enforcement proceedings under Section 401(b) of the Communications Act of 1934.
2. Whether Section 401(b) of the Communications Act of 1934 authorizes private party enforcement of Federal Communications Commission rulemaking decisions such as the "Preemption Order."

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BRIEF FOR THE PETITIONER**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a) is reported at 748 F.2d 787. The decision of the United States District Court for the District of Maryland (Pet. App. 11a) is reported at 560 F. Supp. 844. The Memorandum, Opinion and Order of the Federal Communications Commission (Pet. App. 40a) is reported at 92 FCC2d 864.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1984. A Petition for Writ of Certiorari was filed by the Public Service Commission of Maryland on February 15, 1985, within the time prescribed by 28 U.S.C. § 2101(c). This Court has jurisdiction to review the decision below under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Communications Act of 1934, 47 U.S.C. § 151, *et seq.*, the regulations issued thereunder, and Article 78 of the *Annotated Code of Maryland* are reprinted in the Appendix, *infra*, A1-A9.

STATEMENT

1. This case concerns the authority of a United States District Court to issue a preliminary injunction under Section 401(b) of the Communications Act of 1934¹ enforcing a rulemaking decision of the Federal Communications Commission ("FCC") against a state utility regulatory commission. In the FCC decision which was enforced by the District Court, the FCC had concluded that the language and legislative history of the Communications Act, coupled with its authority to preempt state actions that interfere with federal policies, empowered the FCC to preempt inconsistent state depreciation policies and practices ("Preemption Order") (Pet. App. 40a-71a). After finding that the Public Service Commission of Maryland ("Md. PSC") was in disobedience of the "Preemption Order", the District Court issued a preliminary injunction on behalf of The Chesapeake and Potomac Telephone Company of Maryland ("C&P") which directed the Md. PSC to establish rates for C&P which would be sufficient to recover the intrastate revenue requirement

resulting from the FCC-prescribed depreciation rates and methodologies (Pet. App. 11a-13a).

2. Local telephone facilities in the United States are used interchangeably to provide both interstate and intrastate telephone service. In enacting the Communications Act of 1934, Congress established a dual system of regulation whereby control over the operations and facilities of local telephone companies would be the shared responsibility of federal and state or local authorities. Accordingly, Section 152(a) of the Communications Act² provided the FCC with jurisdiction over interstate and foreign communications, while Section 152(b)³ expressly reserved to the states the authority to prescribe rates for intrastate and local service. *See also* 47 U.S.C. § 221(b).

3. The rates which are established for telephone service must include an appropriate allowance for depreciation expense. 1 A.J.G. Priest *Principles of Public Utility Regulation* 45 (1969). In general, "depreciation is the loss, not restored by current maintenance, which is due to all factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy, and obsolescence. Annual depreciation is the loss which takes place in a year." *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 167 (1934). Since there are numerous methodologies by which a utility's depreciation expense can be computed, the determination as to what constitutes an appropriate level of depreciation for rate-making purposes involves the use of expert judgment by the rate setting authority. *See, e.g., Public Service Commission of Maryland v. Baltimore Gas & Electric Co.*, 273 Md. 357, 371-73, 329 A.2d 691, 699-701 (1974).

² 47 U.S.C. § 152(a).

³ 47 U.S.C. § 152(b).

¹ 47 U.S.C. § 401(b).

Under Section 220 of the Communications Act, the FCC has the authority to determine certain depreciation issues for the carriers that are subject to its jurisdiction. 47 U.S.C. § 220(a),(b). The statute also requires that the FCC provide state commissions with an opportunity to present their views and recommendations before any new accounting requirement for depreciation issues is implemented by that agency. 47 U.S.C. § 220(b),(h). The Md. PSC has, on occasion, submitted comments with respect to the use of certain depreciation practices by Maryland telephone companies. *E.g., American Telephone & Telegraph Co.*, 88 FCC2d 1224 (1982); *Chesapeake & Potomac Telephone Co. of Maryland*, 90 FCC2d 964 (1982).

4. In 1980, the FCC amended its accounting rules to give carriers the option of adopting two depreciation practices permitting faster capital recovery: the "equal life group" and "remaining life" methods. *Amendment of Part 31, etc.*, 83 FCC2d 267 (1980) ("Depreciation Order"). In 1981, the FCC ruled that carriers should expense rather than capitalize their station connection costs. *Amend. of Part 31*, 85 FCC2d 818 (1981) ("Expensing Order").

Following the issuance of the "Expensing Order," the National Association of Regulatory Utility Commissioners and others filed a petition for clarification that FCC-prescribed depreciation policies were not binding on state commissions for purposes of intrastate rate making. On April 27, 1982, the FCC formally affirmed its long-standing and undisputed policy through a *Memorandum Opinion and Order* which stated that state regulatory commissions are not preempted by the FCC from adopting depreciation methods for purposes of intrastate rate making which are inconsistent with methods approved by the FCC. 89 FCC2d 1094 (1982). The Order (which was based on a full FCC review of the Communications Act, its legislative history, and years of case law), concluded that there was no clear Congressional intent to preempt

inconsistent state prescription of depreciation rates. *Id.* at 1106-07. The Order further stated that such state regulation would not frustrate or conflict with valid federal policies. *Id.* at 1108.

Thereafter, American Telephone and Telegraph Company ("AT&T") filed a petition in which it requested the FCC to reconsider this decision, while General Telephone Company of Ohio ("GTE") filed a petition for declaratory ruling in which it requested the FCC to preempt an order of the Public Utilities Commission of Ohio that denied GTE the same depreciation rates for intrastate purposes as had been prescribed by the FCC. These proceedings were subsequently consolidated and on January 6, 1983, the FCC issued its "Preemption Order." In that decision, the FCC reversed the findings of its "Memorandum Opinion and Order" and concluded that Section 220(b) of the Communications Act preempted state depreciation practices which were inconsistent with those which were prescribed by that agency (Pet. App. 48a). Moreover, the FCC also held that even if Section 220(b) did not automatically preempt the states, preemption of inconsistent state depreciation practices would be justified in order to avoid frustration of validly adopted federal policies (Pet. App. 56a). The FCC concluded by stating that where it prescribes depreciation rates for classes of property, state commissions are precluded from departing from those rates (Pet. App. 61a). Moreover, it noted that since the depreciation method utilized is a material part in determining the rate to be applied, state commissions are also precluded from departing from the depreciation methods prescribed by the Commission. *Id.*

Although the Md. PSC was not a party to the *Amendment of Part 31* reconsideration proceeding, other state commissions were, and several of these commissions appealed the FCC's rulemaking to the United States Court of Appeals for the Fourth Circuit. By a two-to-one

majority, the Court of Appeals affirmed the FCC's "Preemption Order." *Virginia State Corporation Commission v. FCC*, 737 F.2d 388 (4th Cir. 1984). This Court subsequently granted certiorari in *California v. FCC*, 105 S. Ct. 3496 (June 26, 1985).

C&P is a public service company and as such the intrastate telephone services which it provides in Maryland are subject to the jurisdiction of the Md. PSC. *Md. Ann. Code* art. 78, § 1, et seq. (1980 Repl. Vol. and 1984 Cum. Supp.). Among other powers conferred on the Md. PSC by Article 78 is the power to determine just and reasonable rates for all public service companies, including C&P. *Md. Ann. Code* art. 78, § 68(a) (1984 Cum. Supp.). Accordingly, the Md. PSC is a "state commission" as that term is defined in Section 153(t) of the Act. 47 U.S.C. § 153(t).

In July 1982, C&P filed an application for a rate increase for its intrastate operations with the Md. PSC. By Order No. 66114, which was entered in Case No. 7661 on February 18, 1983, the Md. PSC authorized C&P to file new rates for intrastate telephone service in Maryland (J.A. 50). Among other issues which were considered by the Md. PSC in determining C&P's revenue requirement was what constituted an appropriate allowance for depreciation expense. For various reasons which are set forth in its Opinion and Order, the Commission concluded that the depreciation practices established by the FCC in no way limited its authority to independently determine the appropriate level of depreciation expense to be reflected in intrastate rates for telephone service (J.A. 62-67). Furthermore, the Commission found that based upon the evidence on the record before it, the Company's proposal to adopt remaining life and equal life group depreciation for intrastate rate-making purposes was unreasonable and, as a result, its net operating income adjustment for this change was rejected (J.A. 67-70).

Instead of seeking judicial review of the rate order in the state court system, C&P filed a complaint in the United States District Court for the District of Maryland seeking declaratory and injunctive relief. The District Court granted a preliminary injunction and then closed the docket pending the outcome of the Fourth Circuit appeal challenging the validity of the FCC "Preemption Order." In the interim, the Md. PSC filed an appeal from the District Court's Order to the United States Court of Appeals for the Fourth Circuit. On November 20, 1984, the Fourth Circuit affirmed the District Court, holding that (1) the Md. PSC is a "person" and, therefore, subject to the jurisdiction of the District Court in enforcement proceedings brought under Section 401(b); and (2) the Preemption Order was an "order" within the meaning of Section 401(b) and, therefore, enforceable by the District Court under that Section (Pet. App. 3a-5a).

SUMMARY OF ARGUMENT

Section 401(b) of the Communications Act of 1934 authorizes a private party to bring a federal enforcement action against any "person" who disobeys any "order" of the FCC. Since the Md. PSC is not a "person" as that term is defined in the Communications Act and since the FCC's "Preemption Order" was the product of a rulemaking and not an "order," the District Court lacked jurisdiction under Section 401(b) to issue an injunction on behalf of C&P requiring the Md. PSC to set intrastate rates for telephone service utilizing the depreciation rates which were prescribed by the FCC.

It is apparent from a review of the language which was used to define "person," as well as a consideration of certain fundamental policies which are embodied in the Communications Act, that Congress did not intend the word "person" to encompass a "state commission." In this regard, the word "person" was defined by Congress in the

Communications Act in terms of entities whose characteristics in no way resemble the characteristics which define a "state commission." Accordingly, the plain meaning of the language used to define "person" does not include a "state commission." Moreover, such a construction furthers certain fundamental policies which are embodied in the Communications Act. In this regard, a consideration of the Act as a whole, as well as its history, demonstrates that Congress intended to divide the authority to regulate telecommunications between the FCC, whose authority only extended to interstate and foreign communications, and the respective states, who were provided with the sole responsibility to regulate intrastate telephone rates; neither is subject to the regulatory authority of the other. To the extent that state commissions improperly encroach upon the FCC's jurisdiction, their decisions are subject to reversal on review in the state court system. This view of the Act, coupled with the great deference which was accorded to state commissions by Congress, requires the exclusion of state commissions from the class of "persons" who are subject to the enforcement provisions of Section 401 of the Act.

However, even if a state commission is subject to the enforcement provisions of Section 401, a private party such as C&P cannot enforce the FCC's "Preemption Order" against the Md. PSC under Section 401(b) of the Act. The "Preemption Order" was issued in an FCC rulemaking proceeding and is nothing more than a statement of that agency which purports to interpret certain provisions of the Communications Act, to implement agency policy, and to establish a standard for future conduct. As such, the "Preemption Order" is the product of a rulemaking and is not an adjudicatory order.

Since the "Preemption Order" is not an adjudicatory order, it cannot be enforced by a federal district court under Section 401(b) of the Act. The enforcement scheme

which was established by Congress in Section 401 only permits the FCC to institute proceedings for the purpose of enforcing compliance with the Act. 47 U.S.C. § 401(a). Since the enforcement of FCC rules, regulations, and declaratory rulings in effect constitutes the enforcement of the Act itself, such proceedings can only be instituted by the FCC under Section 401(a). Alternatively, the FCC can determine in an adjudicatory proceeding that a specific action of a specific person is in violation of the Act or the rules and regulations it has promulgated under the Act. The order which is issued in such a proceeding can then be enforced by a private party under Section 401(b).

Finally, it is apparent that if the policy of promoting the development of a uniform, nationwide interstate communications policy permits the FCC to preempt inconsistent state depreciation practices, that policy also requires the FCC, rather than private parties, to enforce its "Preemption Order." Private enforcement of the "order" has and will continue to produce different results in different jurisdictions and thereby undermines the stated purpose of the "Preemption Order."

ARGUMENT

I.

STATE COMMISSIONS AND INDIVIDUALS WHO ACT IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF STATE COMMISSIONS ARE NOT "PERSONS" WHO ARE SUBJECT TO ENFORCEMENT PROCEEDINGS WHICH ARE INSTITUTED UNDER SECTION 401 OF THE COMMUNICATIONS ACT.

Section 401 was enacted by Congress more than 50 years ago as an original part of the Communications Act of 1934 (Act of June 19, 1934, ch. 652, Title IV, § 401, 48 Stat. 1092). With two minor exceptions which are not

relevant to the proceedings before the Court, the provisions of this Section have remained unchanged since 1934.⁴

For nearly 50 years, the enforcement provisions of this Section were never construed to apply to state commissions. Recently, however, numerous proceedings have been instituted in various federal district courts by local telephone companies seeking injunctions against certain state commissions under Section 401(b) of the Act. In a majority of jurisdictions, federal courts have found that Section 401(b) authorizes the issuance of injunctions which require state commissions to obey the FCC "Preemption Order" and to utilize that agency's prescribed depreciation practices for intrastate rate-making purposes. *E.g., South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 744 F.2d 1107 (5th Cir. 1984); *Chesapeake & Potomac Telephone Co. of Maryland v. Public Service Commission of Maryland*, 748 F.2d 879 (4th Cir. 1984), cert. granted, 105 S. Ct. 3498 (1985); and *Mountain States Telephone & Telegraph Co. v. Department of Public Service Regulation*, 588 F. Supp. 5 (D. Mont. 1983). In reaching this conclusion, these courts were required to find, among other things, that state commissions were "persons" against whom the enforcement powers set forth in Section 401 were applicable. *Chesapeake & Potomac Telephone Co. of Maryland v. Public Service Commission of Maryland*, 748 F.2d 879 (4th Cir. 1984) cert. granted, 105 S. Ct. 3498 (1985); *Pacific Northwest Bell Telephone Co. v. Washington Utilities & Transportation Commission*, 565 F. Supp. 17 (W.D. Wash. 1983). *Contra, New England Telephone & Telegraph Co. v. Public Service Board of Vermont*, 576 F. Supp. 490 (D. Vt.

⁴ In 1948, Section 401(c) was amended by substituting the term "United States Attorney" for "District Attorney." Act of June 25, 1948, ch. 646, § 1, 62 Stat. 909. In 1974, Section 401(d) was deleted. Act of December 21, 1974, P.L. 93-528, § 6(a), 88 Stat. 1709.

1983). For the reasons which follow, this new interpretation of the term "person" is inconsistent with the plain meaning of the language contained in the Communications Act of 1934, as well as the legislative policies which are embodied in the Act.

A. THE PLAIN MEANING OF THE TERM "PERSON", AS DEFINED IN SECTION 153(i) OF THE COMMUNICATIONS ACT AND USED IN SECTION 401(b), DOES NOT INCLUDE "STATE COMMISSIONS."

A review of the relevant statutory provisions demonstrates that Congress did not intend to include "state commissions" in the class of persons who are subject to enforcement proceedings under Section 401(b) of the Communications Act. In this regard, Section 401(b) provides as follows:

(b) Orders of Commission. If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

The definition of "person" is set forth in Section 153(i) of the Act, which provides "(i) 'Person' includes an individual, partnership, association, joint-stock company, trust, or corporation." The term "state commission" is separately defined in Section 153(t) as follows: "(t) 'State commission' means the commission, board, or official (by

whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." Since a determination as to whether or not state commissions are amenable to suit under Section 401(b) of the Act requires an interpretation of the word "person" as that word is used in that section, it is appropriate to briefly state the rules governing statutory construction which have been enumerated by this Court and then apply those rules to the case at bar. Under these rules, statutory construction must begin with the language of the statute itself⁵ because absent a clear indication of legislative intent to the contrary, the statutory language controls its construction. *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n.3 (1981). Moreover, if the court finds the terms of a statute to be unambiguous, judicial inquiry is at an end, except "in 'rare and exceptional circumstances.'" *Rubin v. United States*, 449 U.S. 424, 430 (1981) (citation omitted).

A review of the language contained in Section 153(i) strongly supports the proposition that, as a general rule, state commissions are not to be considered "persons" for purposes of the Act. As previously stated, under Section 153(i), "'person' includes an individual, partnership, association, joint-stock company, trust, or corporation." Initially, it should be noted that Congress defined the word "person" by using the term "includes" rather than the term "means." It is well established that a term whose statutory definition declares what it "includes" is more susceptible to extension of meaning by construction than where the definition declares what the term "means." *Sutherland Stat. Const.* § 47.07 (4th ed. 1984). In general, the word "includes" is a term of enlargement and not limitation⁶ and conveys the conclusion that there are

⁵ *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 198-99 (1976).

⁶ *United States v. Gertz*, 249 F.2d 662, 666 (9th Cir. 1957).

other items includable though not specifically enumerated by the statute. *Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968). As this Court noted in *Helvering v. Morgan's*, 293 U.S. 121, 125 n.1 (1934), "the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition." It is not one of all-embracing definition, "but connotes simply an illustrative application of the general principle." *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1934).

Although the term "person" can properly be enlarged to include entities other than those expressly mentioned in the definition, the entities so included must bear some relationship to the class established by the specific illustrations contained in the definition. If the definition is not so limited, then the decision of Congress to provide a definition would serve no purpose. It is necessary, therefore, to consider the nature of the enumerated examples to determine what characteristics define the class and whether or not the entity in question (i.e., a "state commission") possess those characteristics or is sufficiently different so as to warrant exclusion from the class.

Such an analysis demonstrates that a state commission is substantially different in nature from the entities enumerated in Section 153(i) of the Act. Each of the enumerated entities⁷ are private parties presumably pursuing their private interests. State commissions, on the other hand, exercise the states' police powers which have been delegated to them by their state legislatures. Their actions are taken to further public rather than private

⁷ It is interesting to compare the definition of "person" in Section 153(i) of the Act with the definition of "person" which is contained in Section 551(2) of the Administrative Procedure Act, 5 U.S.C. § 551(2). In Section 551(2), the term person "includes an individual, partnership, corporation, association, or public or private organization . . ." (emphasis added).

interests and their decisions are subject to judicial review.⁸ Congress, in recognition of the important and unique role that state commissions would play in the regulatory scheme established by the Communications Act, has also provided a separate definition of "state commission" in Section 153. Having determined that the unique nature of a state commission required a separate definition in the Act, Congress clearly would have expressly included "state commission" in the definition of "person" if it intended the latter to encompass the former.

Finally, a review of the provisions of Section 208 of the Communications Act⁹ clearly demonstrates that Congress did not consider a "state commission" to be a "person" as that term is used in the Act. This Section, which was included as a part of the 1934 Act,¹⁰ establishes a procedure for filing complaints with the FCC and provides, in pertinent part:

Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing

⁸ Moreover, since decisions of state commissions are subject to judicial review, it is unnecessary to also subject their actions to the enforcement provisions contained in Section 401. Under the Supremacy Clause of the United States Constitution (U.S. CONST. art. VI, cl. 2), state courts must set aside any state commission decision which is contrary to the provisions of the Communications Act. The decisions of a state's highest court are, of course, reviewable by this Court.

⁹ 47 U.S.C. § 208.

¹⁰ Communications Act of 1934, Ch. 652, Title II, § 208, 48 Stat. 1073.

within a reasonable time to be specified by the Commission. (Emphasis added.)

It is a well-settled principle of statutory construction that a court must give effect, if possible, to every word of the statute. *Bowsher v. Merck & Co.*, 460 U.S. 824, 833 (1983) and *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 163 (1982); a statute should not be construed in a fashion which leaves some provisions superfluous. *Bell v. New Jersey & Pennsylvania*, 461 U.S. 773, 788-89 (1983). Clearly, if Congress had intended to have the definition of the term "person" include "state commissions," it would have been unnecessary to provide in Section 208 that in addition to a "person," a "state commission" would have the right to file a complaint with the FCC. Such a construction obviously renders the language "any body politic or municipal organization, or State commission" superfluous.

B. EXCLUSION OF "STATE COMMISSIONS" FROM THE CLASS OF PERSONS WHO ARE SUBJECT TO ENFORCEMENT PROCEEDINGS UNDER SECTION 401 IS CONSISTENT WITH THE FUNDAMENTAL CONGRESSIONAL POLICIES WHICH ARE EMBODIED IN THE COMMUNICATIONS ACT.

Although the plain meaning of the language contained in Section 153(i) clearly indicates that a "state commission" is not to be considered a "person" for purposes of enforcement proceedings instituted under Section 401, the "ascertainment of the meaning apparent on the face of a single statute need not end the inquiry." *Watt v. Alaska*, 451 U.S. 259, 266 (1981). For example, when the plain meaning of the statutory language produces absurd or unreasonable results which are plainly at variance with the policy of the legislation as a whole, courts will give effect to the legislative policy and not to the literal meaning of the words. *United States v. American Trucking Associations*, 310 U.S. 534, 543 (1940); *Ozawa v. United*

States, 260 U.S. 178, 194 (1922). The plain meaning rule is "rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928). Moreover, this Court has noted that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy," *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 18 (1981) (Citation omitted).¹¹ Nevertheless, in the absence of a clearly expressed legislative intent to the contrary, the language must ordinarily be regarded as conclusive. *United States v. Turkette*, 452 U.S. 576, 580 (1981).

Rather than detract from or contradict the plain meaning of the statute, a review of the various provisions of the Communications Act, as well as the policies embodied in those provisions, provides further support for the conclusion that Congress did not intend to include state commissions within the class of persons who are subject to the enforcement actions instituted under Section 401. In this regard, it should first be noted that under Section 152(a), the provisions of the Communications Act were expressly made applicable only to a specific class of "persons", i.e., those "persons engaged within the United States in such communications [i.e., interstate communications by wire or radio] or such transmission of energy by radio." 47 U.S.C. § 152(a). By concluding that a state commission is subject to enforcement proceedings instituted under Section 401(b), the Court below, in effect, is making the provisions of the Act applicable to entities

¹¹ This general policy of reviewing the provisions of the whole law in order to ascertain the meaning of one part of that law has been made specifically applicable to the construction of the Communications Act. *United States v. Storer Broadcasting Co.* 351 U.S. 192, 203 (1956).

other than those "engaged in communications by wire or radio."

In addition to limiting the applicability of the Act to a certain class (i.e., persons engaged in communications by wire or radio), Congress also limited the subject matter of the FCC's jurisdiction. For example, Section 151 of the Act provides that the FCC was created "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio . . .," while Section 152(a) states that the provisions of the Act "shall apply to all interstate and foreign communication by wire or radio. . . ."

Although this language may appear to be sufficient to establish that Congress intended to exclude intrastate communications from the FCC's jurisdiction, in view of this Court's decision in the *Shreveport* rate cases,¹² a more explicit limitation was placed in the Act.¹³ By expressly preserving the authority of states to regulate rates and charges incident to intrastate communications service,¹⁴ it is apparent that Congress intended to establish a dual system of regulation as a fundamental part of the Communications Act. Although the jurisdictional boundary between state and federal regulatory authority is not always subject to precise location, there unquestionably exists two separate and distinct areas of regulatory authority. Under this system, communications are to be jointly regulated by the FCC and the various state commissions, and neither is subject to the regulatory authority of the other within these respective areas of authority. This view of the Communications Act (i.e., the

¹² *Houston, East & West Texas Railway Co. v. United States*, 234 U.S. 342 (1914).

¹³ See, e.g., 78 Cong. Rec. 8823 (1934); Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce, 73d Cong., 2d Sess. 154 (1934).

¹⁴ See 47 U.S.C. §§ 151(b) and 221(b).

establishment of a dual system of regulation) is consistent with a definition of "person" for the purposes of Section 401 which excludes state commissions; rather than subject state commissions to FCC control, the Act divides regulatory responsibility among these entities and only authorizes the FCC to act within its area of responsibility without interfering with the states' regulation of intrastate communications.

The importance of state commissions in this dual regulatory system and the deference accorded to these agencies by Congress are further established by a consideration of the numerous references to these entities which are contained in the Act. For example, Section 213 of the Act, which permits the FCC to make a valuation of the property of a carrier, expressly provides that "[n]othing in this section shall impair or diminish the powers of any State commission." 47 U.S.C. § 213(h). Moreover, under Section 220(j), the FCC is directed to investigate and report to Congress as to the need for legislation "to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates." (i.e., accounts and records including accounting practices relating to depreciation charges). 47 U.S.C. § 220(j). Such a requirement is, of course, indicative of an intention to establish two equal and independent regulatory authorities and to have jurisdictional disputes resolved by Congress, not by the FCC. Finally, in order to facilitate cooperation between these independent regulatory authorities and to permit state participation in the FCC's decision-making process, Section 410(a) authorizes the FCC to refer any matter arising in its administration of the Act to a federal/state joint board. 47 U.S.C. § 410(a).

C. INCLUSION OF "STATE COMMISSIONS" IN THE CLASS OF PERSONS WHO ARE SUBJECT TO ENFORCEMENT PROCEEDINGS UNDER SECTION 401 WILL PERMIT FEDERAL COURTS TO INTERFERE IN INTRASTATE RATE MAKING, AN AREA TRADITIONALLY RESERVED TO THE STATES.

It is apparent that the enlargement of the scope of the definition of the word "person" to include "state commission" will permit federal courts to intervene in matters which have traditionally been left to state regulation, i.e., the establishment of rates for local utility service. Consequently, the construction of Section 153(i) and Section 401 "implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government." *Palmer v. Massachusetts*, 308 U.S. 79, 84 (1939). In previous cases involving questions of statutory construction, "this Court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress." *Id.*¹⁵ Not only has Congress failed to explicitly make state commissions subject to the enforcement provisions of Section 401(b), but to do so would clearly require judicial expansion of the definition of "person" that reaches far beyond the language which is contained in Section 153(i). *New England Telephone & Telegraph Co. v. Public Service Board of Vermont*, 576 F. Supp. 490, 494 (D. Vt. 1983). Given the consequences that such an expansive interpretation would have in an area which has traditionally been reserved to the states (i.e., intrastate

¹⁵ See also *FTC v. Bunte Brothers*, 312 U.S. 349, 351 (1941) (the reach of Section 5 of the Federal Trade Act is not to be extended beyond the plain meaning of the language which was used by Congress unless the purpose of the Act would be defeated) and *A. B. Kirschbaum Co. v. Walling*, 316 U.S. 517, 521-22 (1942) (when the federal government takes over local functions and thereby radically readjusts to the balance of state and national authority, legislators have a duty to be explicit and not rely on a retrospective expansion of the meaning by the judiciary).

reserved to the states (i.e., intrastate rate making), the Court should limit the scope of the definition to the plain meaning of the language which was used by Congress.

It also should be noted that the inapplicability of the enforcement provisions of Section 401 to state commissions is consistent with a well-established Congressional policy to keep issues relating to intrastate rate making out of federal courts, where there is an adequate remedy in the state court system. In this regard, the Johnson Act (28 U.S.C. § 1342) prohibits, under certain circumstances, the issuance of federal injunctions with respect to intrastate utility rates. As the Court noted in *Tennyson v. Gas Service Co.*, 506 F.2d 1135 (10th Cir. 1974): "[b]ehind the Act were years of hostilities generated from jurisdiction in both the state and federal systems, removal of which was deemed desirable to the national policy. Thus the restriction imposed was far-reaching, going to jurisdiction itself." *Id.* at 1138. (Citation omitted).

Moreover, even when the Johnson Act is technically not applicable, the policy against federal court interference in intrastate rate making may require federal abstention when there is an adequate state court remedy. *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341, 349-50 (1951). This policy is also a fundamental principle which is embodied in various provisions of the Communications Act, including that provision which excludes "state commissions" from the definition of "person."

D. THE EXCLUSION OF "STATE COMMISSIONS" FROM THE CLASS OF PERSONS WHO ARE SUBJECT TO ENFORCEMENT PROCEEDINGS UNDER SECTION 401 NECESSARILY IMPLIES A SIMILAR EXCLUSION FOR THE MEMBERS OF THOSE BODIES.

It has also been argued that even if a "state commission" is not a "person" for purposes of enforcement

proceedings under Section 401(b), the "individuals" who comprise those commissions are included in the definition of that term. Since individual commissioners were also named as defendants in the various suits which were filed, the District Court could issue the injunctions under Section 401(b) against these "persons." *Chesapeake & Potomac Telephone Co. of Maryland v. Public Service Commission of Maryland*, 748 F.2d 879, 881 (4th Cir. 1984), cert. granted, 105 S. Ct. 3498 (1985).

With respect to this argument it is sufficient to state that since Congress clearly intended to exclude "state commissions" from the definition of "person," the term "individual," which is referred to in Section 153(i), must be construed in such a way as to exclude members of state commissions when they act in their official capacities as state commissioners. Such a construction is required in order to harmonize the various parts of the statute and to give effect to the fundamental Congressional policies which are embodied in the Act.

II.

THE "PREEMPTION ORDER" IS NOT AN ADJUDICATORY ORDER SUBJECT TO ENFORCEMENT BY A PRIVATE PARTY UNDER SECTION 401(b) OF THE COMMUNICATIONS ACT.

Even if state commissions are considered to be "persons" who are subject to enforcement proceedings under Section 401 of the Communications Act, the FCC's "Preemption Order" is not an "order" which can be enforced by a federal court on behalf of a private party under Section 401(b) of the Act. As the First Circuit noted in *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 4, 8-9 (1st Cir. 1984), the FCC's "Preemption Order" is, in fact, the product of a rule-making and is not an order. Since only an order entered in an adjudicatory proceeding is enforceable under Section

401(b), the District Court was without authority to issue an injunction to require obedience to the FCC's "Pre-emption Order." *Id.* at 4-7. Although a contrary conclusion has been reached by the Fourth, Fifth and Eighth Circuits,¹⁶ the findings of the First Circuit should be adopted since they are in accord with the enforcement scheme which was established by Congress and further the Congressional policies which underlie the various provisions of the Communications Act.

A. THE FCC'S "PREEMPTION ORDER" IS THE PRODUCT OF A RULEMAKING AND IS NOT AN ORDER WHICH WAS ENTERED IN AN ADJUDICATORY PROCEEDING.

It is apparent that there exists a clear distinction between the rules which are promulgated by the FCC and the orders which are rendered by that agency. In this regard, Section 154(i) of the Act provides that: "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions." If "rules" and "orders" were considered to be synonymous, it would have been unnecessary for Congress to separately identify "rules" and "orders" in this Section. Moreover, although the Communications Act does not specifically define "orders" and "rules and regulations," this Court has distinguished them as follows:

Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. Unlike an administrative order or a court judgment adjudicating the

¹⁶ *Chesapeake & Potomac Telephone Co. of Maryland v. Public Service Commission of Maryland*, 748 F.2d 879 (4th Cir. 1984), cert. granted, 105 S. Ct. 3498 (1985); *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 744 F.2d 1107 (5th Cir. 1984); and *Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, 738 F.2d 901 (8th Cir. 1984).

rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 418 (1942).

Consequently, FCC rules apply to all persons (including non-parties), set a standard of conduct, and are not self-executing. It is through the valid exercise of its rule-making power that the FCC makes new law,¹⁷ thereby "filling in the interstices . . ." of the statute. *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 202 (1947). FCC orders, on the other hand, adjudicate the rights of individuals and are only binding on the parties to the adjudication.

Further guidance as to what constitutes an agency "rule" and what constitutes an agency "order" is supplied by certain provisions of the Administrative Procedure Act ("APA")¹⁸ 5 U.S.C. §§ 551, *et seq.* The APA defines a rule as "an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U.S.C. § 551(4). The APA also defines the word "order" as "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making. . . ." 5 U.S.C. § 551(6) (emphasis added). From the foregoing, it is clear that not only is there a distinction between "orders" and "rules," but an agency action which contains a statement of general applicability and future effect and which interprets the law or prescribes policy is to be considered a rule and not an order.

¹⁷ *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 202-03 (1940).

¹⁸ Although the APA was enacted subsequent to the enactment of the Communications Act of 1934 and its definitions

Accordingly, in determining whether or not the FCC's "Preemption Order" is enforceable by a private party under Section 401(b) of the Act, it is important to first establish the nature of the action which was taken by the FCC (i.e., did it promulgate a rule or issue an order). Although the FCC has labeled its action a "Memorandum Opinion and Order," "[t]he particular label placed upon [a decision] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do, and has done which is decisive." *Columbia Broadcasting System v. United States*, 316 U.S. 407, 416 (1942). It is particularly important to disregard the labels which the FCC attaches to its actions since that agency commonly adopts "rules" in opinions it calls "orders." See, e.g., 47 C.F.R. § 1.429(i). A consideration of the context in which the FCC decision was made as well as an analysis of the substance of what the FCC purported to do firmly establishes that the "Preemption Order" is the product of a rulemaking and does not constitute an order of that agency.

Initially, it should be noted that the "Preemption Order" was issued in an FCC rulemaking proceeding. That proceeding was originally instituted for the purpose of determining whether or not certain telephone assets should be expensed or depreciated and was docketed as *In Re Amendment of Part 31, Uniform System of Accounts, etc.*, Docket No. CC 79-105. However, the proceeding was subsequently expanded to include consideration of a Petition for Declaratory Ruling that requested the FCC to preempt an order of the Ohio PUC which denied GTE of

only apply to the APA, the Act was the product of extensive study of pre-existing procedure and some of its provisions were largely declaratory of existing law. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 5 (1st Cir. 1984). Accordingly, reference to the APA's definitions appropriately can be used in determining the proper construction of pre-existing related procedural statutes such as Section 401(b) of the Communications Act of 1934.

Ohio the same depreciation rates for intrastate rate-making purposes as had been prescribed by the FCC.

While it is apparent that the FCC conducted a rulemaking proceeding in *Amendment of Part 31*, it could be argued that in response to the Petition for Declaratory Ruling, the FCC conducted an "adjudicatory proceeding" which led to the issuance of a "declaratory order." With respect to this argument, it is sufficient to state that the "declaratory ruling" proceedings were conducted in the same manner as the rulemaking in *Amendment of Part 31*. There is absolutely no indication that either proceeding was conducted as an adjudication. Moreover, to the extent that the FCC conducted an adjudicatory proceeding on the Petition for Declaratory Ruling, the results of that adjudication would only be binding on the parties to that proceeding and perhaps on the parties in *Amendment of Part 31*. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 418 (1942). As previously stated, the Md. PSC was not a party to either the declaratory ruling proceeding or to the proceedings which were conducted on a consolidated basis with *Amendment of Part 31*.

A review of the various provisions of the FCC's "Memorandum Opinion and Order" indicates that that Order merely purports to interpret the law (i.e., Section 220(b) automatically preempts inconsistent state depreciation practices);¹⁹ to implement agency policy (i.e., even if Section 220(b) does not automatically preempt inconsistent state practices, such practices will be preempted by the FCC since they frustrate vital national policies);²⁰ and to establish a standard of conduct for the future (i.e., FCC depreciation prescriptions are to be followed in federal and state jurisdictions unless the FCC provides otherwise).²¹ This decision does not and cannot adjudicate the rights of

¹⁹ Pet. App. 56a.

²⁰ Pet. App. 60a.

²¹ Pet. App. 48a.

the Md. PSC, nor does it order the Md. PSC to take any specific action; the ordering paragraphs of the FCC's "Preemption Order" merely grant the Petition for Reconsideration which was filed by AT&T and the Petition for Declaratory Ruling which was filed by General Telephone Company of Ohio, as well as direct the FCC's Secretary to publish the Order in the *Federal Register* and to serve a copy of the Order on each state commission (Pet. App. 62a).

Finally, certain statements which were made by the FCC concerning the purpose of its "Preemption Order" are particularly helpful in ascertaining the nature of that decision. In this regard, the FCC stated in response to an argument that its ruling was premature:²²

We do not agree since the purpose of declaratory rulings is to give guidance to affected persons in areas where uncertainty or confusion exists. A case or controversy in the judicial sense is not required. In this case, it appears necessary to issue such a ruling to clarify for the state commissions and the carriers the effect of our depreciation prescriptions (Citation omitted.) (Pet. App. 60a).

Accordingly, the stated purpose of the "Preemption Order" was to provide "guidance" to state commissions by clarifying the effect of the FCC's depreciation prescriptions. This is clearly an attribute of a rule or regulation and not an order. 5 U.S.C. §§ 551(4) and (6). The "Preemption Order" was not an attempt to determine, in an adjudicatory proceeding, whether or not any state commission had committed a specific violation of either the Communications Act, or any FCC rules or policies. Moreover, since a "case or controversy" was not before the FCC, such an adjudication could not be made by that agency.

²² The Ohio PUC had argued that since its rate order was subject to reconsideration at the request of GTE of Ohio, the FCC should delay issuing a declaratory ruling. (Pet. App. 60a.).

For the foregoing reasons, the Court should find that the First Circuit was correct in its determination that the "Preemption Order" was the product of an FCC rulemaking and not an adjudicatory order.

B. FCC RULEMAKING ORDERS, SUCH AS THE "PREEMPTION ORDER," CANNOT BE ENFORCED BY PRIVATE PARTIES UNDER THE PROVISIONS OF SECTION 401(b) OF THE COMMUNICATIONS ACT.

Since the FCC's "Preemption Order" was not an adjudicatory order but rather a product of a rulemaking proceeding, this decision cannot be enforced by a federal court on behalf of a private party under Section 401(b) of the Communications Act. The "Preemption Order" is not enforceable under Section 401(b) because that Section only authorizes federal courts to enforce FCC "orders" that are entered in adjudicatory proceedings and not FCC decisions that are a product of a rulemaking. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 4-7 (1st Cir. 1984).

1. The Plain Meaning Of The Language Which Is Used In Section 401(b) Indicates That Only FCC "Orders" And Not Decisions Which Are The Product Of A Rulemaking Can Be Enforced Under That Section.

In determining the types of actions which can be enforced under Section 401(b), it is appropriate to begin with an analysis of the language which was used by Congress in this Section. As previously mentioned, there is a recognition in various parts of the Communications Act that the term "order" does not encompass "rules or regulations." E.g., 47 U.S.C. § 154(i). Accordingly, since the language contained in Section 401(b) only refers to the enforcement of FCC "orders," it is reasonable to assume that Congress did not intend to provide an enforcement

mechanism in this Section for other types of FCC actions. Moreover, the use of words such as "obey" and "disobedience" rather than "violation" and "comply" also indicates that Section 401(b) was intended only to provide a means of enforcing self-executing directives. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 565 F. Supp. 949, 957-58 (D. Me. 1983). It does not provide a means of enforcing compliance with FCC rules or preventing a violation of the Act. As will be demonstrated in the following section of this Brief, other provisions of the Act have been enacted for that purpose.

There are numerous references to FCC orders in various provisions of the Communications Act. However, in only one provision, Section 402(a),²³ has the term "order" been construed to encompass FCC rules and regulations, as well as orders entered in adjudicatory proceedings. In this regard, Section 402(a), which provides for judicial review of FCC actions, states:

Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United States Code [28 USCS §§ 2341 et seq.].

In the proceedings below, the Fourth Circuit held that since the FCC's "Preemption Order" was considered an "order" for purposes of judicial review under Section 402 of the Act,²⁴ it must also be considered an "order" for purposes of instituting a private enforcement action under Section 401(b). *Chesapeake & Potomac Telephone Co. of Maryland v. Public Service Commission of Maryland*, 748

F.2d 879, 881 (4th Cir. 1984), cert. granted, 105 S. Ct. 3498 (1985). *Contra, New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 7-8 (1st Cir. 1984). In support of this conclusion, it has been argued that under established principles of statutory construction, identical words used in different parts of the same act are presumed to have the same meaning. *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1931).

However, this Court has also stated that "the presumption is not rigid" and that the same word may have different meanings in different parts of a statute, "[w]here the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, . . ." *Id.* at 433. In view of the different subject matter contained in these two sections of the Act and the different Congressional policies embodied in those two sections, the word "order" should not be found to have the same meaning in both sections.

As previously mentioned, in *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), the Court was construing the term "order" for purposes of determining whether FCC rules were subject to judicial review. In making such determinations, this Court has stated that there is a "basic presumption of judicial review to one 'suffering legal wrong of agency action, . . .'" and that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) (Citation omitted.) These policies required a broad interpretation of the word "order" in *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942) because, as the Court noted:

²³ 47 U.S.C. § 402(a).

²⁴ In *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), this Court determined that the word "order" as it was used in Section 402 encompassed FCC rules.

The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, . . . *Id.* at 425.

Given the "exceptional" nature of the case which was before the Court²⁵ and the fact that CBS clearly suffered irreparable harm as a result of the promulgation of the FCC's "policy statement," the Court concluded that the rules in question were subject to review under Section 402.

These policy considerations, which underlie the Court's broad construction of the word "order" as it appears in Section 402, are obviously not involved in the construction of that word as it is used in Section 401(b). More importantly, such a broad construction would be contrary to the language which was used by Congress, the enforcement scheme which is contained in Section 401, and certain fundamental policies which are embodied in the Act. For these reasons, the desirability of maintaining linguistic uniformity among different sections of the Act is not controlling in this case.²⁶

²⁵ *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942) concerned the FCC's General Broadcasting Regulations which told broadcasting stations in part how they were to deal with the networks. If CBS had to wait until the regulations were enforced to secure judicial review of their validity, it might have to wait forever, since the stations intended to obey the regulations to CBS' detriment. *Id.* at 423-424.

²⁶ It has also been asserted that this Court's decision in *Ambassador, Inc. v. United States*, 325 U.S. 317 (1945) governs the construction of the word "order" in this proceeding. Although the Court did not identify the specific subsection of Section 401 which authorized the issuance of an injunction against certain hotel owners, it found jurisdiction because "a departure" from an FCC approved tariff "is forbidden by the Act," *Id.* at 325, thus bringing the suit within the terms of

2. Under The Enforcement Scheme Established In Section 401 Of The Act, Only Adjudicatory Orders Can Be Enforced On Behalf Of Private Parties Under Section 401(b).

The conclusion that only orders which are entered in adjudicatory proceedings can be enforced under Section 401(b) is further supported by a consideration of the enforcement provisions which are contained in Section 401(a) of the Act. 47 U.S.C. § 401(a). This Section states that:

[t]he district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this Act by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act.

Therefore, while the FCC, the United States, or a private person can obtain an injunction under Section 401(b) requiring a person to obey an FCC order, only the FCC can request a federal court, pursuant to Section 401(a), to enjoin "a failure to comply with or a violation of any of the provisions" of the Act; it has the sole responsibility for determining where and how to enforce the Act. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 5 (1st Cir. 1984); *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 500 (1st Cir. 1950).

Since rules and regulations are general in form, highly general in content,²⁷ and "frequently either interpret or

Section 401(a). Moreover, it is apparent that the suit was brought by the United States on behalf of the FCC, and not by a private party under Section 401(b).

²⁷ *Columbia Broadcasting System v. United States*, 316 U.S. 407, 418 (1942).

merely parrot legislation,"²⁸ the enforcement of FCC "rules and regulations" in effect constitutes enforcement of the Act itself. In essence, rules and regulations constitute a source of law which the Commission and the courts must enforce. *Batterton v. Francis*, 432 U.S. 416, 425-26 (1977). Therefore, to construe the term "order" as it appears in Section 401(b) to include FCC "rules and regulations" would permit private parties to enforce compliance with the Act. As the Court noted in *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 5 (1st Cir. 1984):

Section 401(b) is consistent with the Commission's prerogatives under section 401(a) only if the term "order" is read to apply exclusively to those cases in which the Commission has previously considered and determined the specific rights and duties in question and where the private action seeks only to enforce the Commission's specific mandate. Only then would the Commission retain enforcement initiative, selecting a particular target for regulatory action and specifying the regulatory constraints that are to govern the target.

By limiting the applicability of Section 401(b) to orders entered in an adjudicatory proceeding, Congress has insured that only the FCC can enforce the Act, either by instituting a proceeding pursuant to Section 401(a) or by determining through an adjudication that a person has committed a specific violation of the Act or its regulations.

In recognition of the fact that the purpose of the Act "was to protect the public interest in communications,"²⁹ and the fact that "the focus of the Act is on the general public with the FCC, not the private litigant, as its champion,"³⁰ courts have historically declined to enforce

²⁸ *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 565 F. Supp. 949, 956 (D. Me. 1983).

²⁹ *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14 (1942).

³⁰ *Lechtner v. Brownyard*, 679 F.2d 322, 327 (3rd Cir. 1982).

FCC rules and regulations on behalf of private litigants. For example, in *Comtronics, Inc. v. Puerto Rico Telephone Co.*, 409 F. Supp. 800 (D. P.R. 1975), *aff'd on other grounds*, 553 F.2d 701 (1st Cir. 1977), the plaintiff sought injunctive relief alleging, *inter alia*, that the defendant had violated the FCC's "holdings, rulings and policies," *Id.* at 814. In dismissing the action for lack of jurisdiction, the court noted that "[o]nly under section 402(b) (sic) could a subscriber apply to this Court, and then only to obtain enforcement of an order of the FCC, other than for the payment of money." *Id.* at 817. (Emphasis in text.) See also *Kroeger v. Stahl*, 148 F. Supp. 403, 405-06 (D. N.J. 1957), *aff'd* 248 F.2d 121 (3rd Cir. 1957). A broad interpretation of the term "order" which includes "rules and regulations" would have the undesirable effect of creating a private cause of action under the Communications Act, which is contrary to Congress' intent to have the FCC, and not private litigants, enforce the Communications Act.

That FCC rules, regulations and declaratory rulings may not be enforced under Section 401(b) is further supported by cases interpreting 49 U.S.C. § 16(12), a provision of the Interstate Commerce Act.³¹ For example, in *McFaddin Express v. Adley Corp.*, 346 F.2d 424, 426 (2d Cir. 1965), *cert. denied* 382 U.S. 1026 (1966), the ICC "ordered" that an application to permit a management takeover be granted, and "authorized" the same to be done in accordance with a contract executed by the parties and filed therewith. The Court of Appeals for the Second Circuit held that a violation of the contract did not constitute disobedience of an "express command of the ICC" and therefore no cause of action existed under

³¹ The relevance of cases construing § 16(12) is established by examination of the House Report on the Communications Act of 1934, which states that "Section 401(a-c) is based on Sections 20(a), 16(12) and 12(1) of the Interstate Commerce Act." H.R. Rep. No. 1850, 73d Cong., 2d Sess. 7 (1934).

Section 16(12). In *Farmer's Loan & Trust Co. v. Northern Pacific Railway Co.*, 83 F. 249, 268 (D. Wash. 1897), the Court held that "a mere general declaration of the duty of the defendant corporations, as defined in the law itself" was not a "definite order of the [ICC] which can be enforced by a decree of this court" under Section 16(12). Finally, in its discussion of Section 16(12), this Court observed that "[i]n common acceptation a suit to enforce an order of the [ICC] is one which seeks to compel the carrier to whom the order is directed to yield obedience to its command." *Illinois Central Railroad Co. v. Public Utilities Commission of Illinois*, 245 U.S. 493, 502 (1918) (emphasis added).

Thus, cases construing Section 16(12) indicate that "order" under Section 401(b) refers to an express command issued by the FCC to a party to an adjudicatory proceeding. It does not apply to FCC rules, regulations or declaratory rulings, such as the "Preemption Order," which merely state the FCC's interpretation of law and set a standard of conduct.

3. *If The Communications Act Authorizes The FCC To Preempt Inconsistent State Depreciation Practices, Then The Act Also Requires The FCC, Rather Than Private Parties, To Enforce The "Preemption Order."*

It has been argued that one of the purposes underlying the enactment of the Communications Act was to promote uniformity and consistency in interstate communications policy and to centralize the development of such policy in one expert agency. If it is determined that this policy permits the FCC to preempt inconsistent state depreciation practices, then this policy also requires the FCC, and not private litigants, to enforce the "Preemption Order." Uniformity and consistency can only be achieved if the term "order," as it appears in Section 401(b), is narrowly

construed so as to only permit private party enforcement of self-executing orders which are entered by the FCC in adjudicatory proceedings. Private enforcement of FCC "rules and regulations," such as the "Preemption Order," will threaten the very policy which is claimed to justify the FCC's preemption of inconsistent state depreciation practices.

As previously stated, rules, regulations and declaratory rulings, which merely purport to interpret the law, are highly general in content, form and applicability. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 418 (1942). Therefore, the application of rules, regulations, or declaratory rulings in a particular case often requires not only adjudicatory fact-finding but a determination of the scope and meaning of the agency's pronouncements. *Gardner v. Toilet Goods Association*, 387 U.S. 167, 193-98 (Fortas, J., dissenting) (1967); *Board of Trade v. Commodity Futures Trading Commission*, 704 F.2d 929, 932-33 (7th Cir. 1983). Given the fact that additional proceedings are required in order to ascertain whether or not a person is in compliance with FCC rules, regulations, or declaratory rulings, the question becomes whether, under the Communications Act, those proceedings must directly involve the FCC.

The enforcement proceedings which have been instituted under Section 401(b) with respect to the FCC's "Preemption Order" illustrate very well the need to narrowly construe the term "order" as it appears in that Section, and to initially require the FCC to determine whether or not a state commission is in violation of that "order." For example, in a case which was instituted by South Central Bell Telephone Company against the Louisiana Public Service Commission, the District Court concluded that the prerequisites for enforcement under Section 401(b) had been met and directed the Louisiana Commission to comply with the FCC's order by setting

new rates for intrastate service within ten days. *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 570 F. Supp. 227, 232-34 (M.D. La. 1983), *aff'd*, 744 F.2d 1107 (5th Cir. 1984).

In response to the Court's preliminary injunction, the Louisiana Commission issued an order setting new rates. In this order, the Louisiana Commission found that the application of the FCC's prescribed accounting methods resulted in an increased expense level of \$40,506,000. However, after reducing the rate of return from 13.5 percent to 12 percent, the Louisiana Commission also found that an increase in revenue of only \$1,270,000 was needed to meet those increased costs.³²

Thereafter, South Central Bell filed a motion in District Court seeking to modify the preliminary injunction on the basis that the Louisiana Commission's subsequent order was not in compliance with the FCC's "Preemption Order." In response to this motion, the District Court found that "that Commission had absolutely no justification for failing to order an increase in revenues sufficient to cover the increased operating costs of the company." *South Central Bell Telephone Co. v. Louisiana Public Service Commission*. *Id.* at 237. The District Court stated: "Adjusting fair return on equity downward, in the absence of evidence justifying such an adjustment, was arbitrary and capricious — a simple exercise in arithmetic designed to minimize the increase in telephone rates." *Id.* at 237-38. The Court required the Commission to increase intrastate rates by \$40,506,000 and this order was subsequently affirmed by the Court of Appeals. *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 744 F.2d 1107 (5th Cir. 1984).

³² The procedural history of this case which followed the issuance of the preliminary injunction is discussed in *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 744 F.2d 1107, 1112-14 (5th Cir. 1984).

This decision of the Louisiana District Court should be compared with the action which was taken by the District Court in Maine under nearly identical circumstances. In that case, the District Court issued a preliminary injunction requiring the Maine Public Utilities Commission to comply with the FCC's prescribed depreciation rates for intrastate rate-making purposes. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 570 F. Supp. 1558, 1582-83 (D. Me. 1983), *rev'd*, 742 F.2d 1 (1st Cir. 1984).

Following the issuance of an order by the Maine Commission, which authorized a rate increase of \$833,000 rather than the \$1,667,000 rate increase which was sought by the telephone company, the telephone company filed a motion with the District Court in which it maintained that the Maine Commission had failed to comply with the terms of the preliminary injunction. In this regard, the company contended that the Commission had improperly reduced its return on equity and adopted a rate design which would allegedly prevent the company from recovering the full amount of the additional revenues.

After reviewing the evidence on the record, the Court found that the reduction in the return on equity was not unreasonable and that "[t]he rate design chosen by the PUC is neither unreasonable nor unsupported by the evidence." *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 579 F. Supp. 1356, 1362 (1984). Accordingly, it concluded that the Maine Commission's rate order was in compliance with the terms of the preliminary injunction.

Similarly, in a case which was instituted in Kentucky, a federal District Court was required to review a state commission rate-making order to determine whether or not that order was in compliance with the FCC's "Preemption Order." *South Central Bell Telephone Co. v.*

Kentucky Public Service Commission, Civil Action No. 85-02 (E.D. Ky. 1985). In its rate order, the Kentucky Commission expressly ruled that the telephone company could begin recognizing the higher FCC-prescribed depreciation rates as soon as those rates were finally approved by the FCC. However, it denied any additional rate increase because the telephone company had failed to establish the higher depreciation expense would result in an inability to achieve the previously approved 11.475 percent rate of return. In view of the telephone company's allegation that the rate-making methodology which was used by the Kentucky Commission "fails to provide the revenues necessary to recover this added depreciation expense and satisfy the authorized rate of return on investment," the District Court denied the Kentucky Commission's motion for summary judgment. *Id.* at 9. The issue as to whether the Kentucky Commission was in compliance with the "Preemption Order" would be subject to further litigation in the District Court. *Id.* at 10.

From the foregoing, it is apparent that in view of the fact that rate making is a complex function and involves consideration of numerous interdependent factors, enforcement of the "Preemption Order" requires a detailed analysis of the rate-making process to determine whether a state commission has complied with that "Order." In effect, a broad construction of the term "order," so as to include the "Preemption Order," makes state rate-making decisions subject to judicial review in the various federal district courts. Not only is the federal court system ill-equipped to perform such a task, but such a result undermines the Congressional policy which is embodied in the Johnson Act and deprives the FCC of the opportunity to determine for itself whether the state commission's rate decision is contrary to either the Communications Act or the policies that it has adopted under the Act. Moreover, since state commission rate orders are reviewable in the

state court system, the availability of Section 401(b) to enforce the FCC's "Preemption Order" will result in issue-splitting and unnecessary procedural complexity; depreciation issues will be considered in federal district court, while state courts will review all other related issues. Finally, if the goal of promoting the development of a uniform, nationwide interstate communications policy permits the FCC to preempt the use of inconsistent depreciation practices for intrastate rate-making purposes, then that goal also dictates that Section 401(b) not be made available to private parties to enforce the FCC's "Preemption Order." The different decisions which were rendered in Louisiana and Maine clearly demonstrate that the use of such an enforcement procedure will not produce a uniform, nationwide policy.

It may be argued that the FCC does not have the resources to enforce its "Preemption Order" in 50 jurisdictions and, therefore, must rely on private parties to enforce that ruling. However, Congress has determined that the FCC, and not private parties, is to enforce the Communications Act. *Lechtner v. Brownyard*, 679 F.2d 322, 327 (3d Cir. 1982); *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 500 (1st Cir. 1950). If the FCC is correct in its assertion that Section 220(b) and FCC policies preempt inconsistent state depreciation practices, it is charged with the responsibility of determining whether or not specific rate orders are in compliance with the Act and/or the agency's policies. Such a determination can be made in the context of an FCC adjudicatory proceeding or prior to the institution of enforcement proceedings by the FCC under Section 401(a). The FCC cannot, however, abdicate its responsibilities under the Communications Act in favor of private party enforcement under Section 401(b).

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded with directions to enter a judgment in favor of the Petitioner and to vacate the preliminary injunction which was issued by the District Court.

Respectfully submitted,

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APPENDIX

STATUTES AND REGULATIONS INVOLVED

I. UNITED STATES CODE

5 U.S.C. § 551 provides in pertinent part:

§ 551. Definitions

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

28 U.S.C. § 1342 provides in pertinent part:

§ 1342. Rate orders of State agencies

The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and

(2) The order does not interfere with interstate commerce; and

(3) The order has been made after reasonable notice and hearing; and

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

47 U.S.C. § 151 provides in pertinent part:

§ 151. Purposes; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

47 U.S.C. § 152 provides in pertinent part:

§ 152. Application

(a) The provisions of this Act shall apply to all interstate and foreign communications by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmis-

sion of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided;

(b) Except as provided in section 224 [47 USCS § 224] and subject to the provisions of section 301 [47 USCS § 301] and Title VI [47 USCS § 521 et seq.], nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, . . .

47 U.S.C. § 153 provides in pertinent part:

§ 153. Definitions

(i) "Person" includes an individual, partnership, association, joint-stock company, trust, or corporation.

(t) "State commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.

47 U.S.C. § 154 provides in pertinent part:

§ 154. Federal Communications Commission

(i) **Duties and powers.** The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

47 U.S.C. § 208 provides:

§ 208. Complaints to Commission; investigations

Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission.

* * *

47 U.S.C. § 213 provides in pertinent part:

§ 213. Valuation of property of carrier

(h) State commissions. Nothing in this section shall impair or diminish the powers of any State commission.

47 U.S.C. § 220 provides in pertinent part:

§ 220. Accounts, records, and memoranda

(b) Depreciation charges. The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes [classes] of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other

charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

(j) Report to Congress on need for further legislation. The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates.

47 U.S.C. § 221 provides in pertinent part:

§ 221. Consolidations and mergers of telephone companies

(b) State jurisdiction over services. Subject to the provisions of section 301 [47 USCS § 301], nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

47 U.S.C. § 401 provides:

§ 401. Enforcement provisions.

(a) Jurisdiction. The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this Act by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act.

(b) Orders of Commission. If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(c) Duty to prosecute. Upon the request of the Commission it shall be the duty of any district attorney [United States attorney] of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

47 U.S.C. § 402 provides in pertinent part:

§ 402. Judicial review of Commission's orders and decisions

(a) Procedure. Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United States Code [28 USCS §§ 2341 et seq.].

47 U.S.C. § 410 provides in pertinent part:

§ 410. Joint boards and commissions

(a) State joint boards; reference of communication matters; ~~composition~~; jurisdiction, powers, duties, and obligations; conduct of proceedings; force and effect of joint board action; members: nomination, appointment, and rejection; allowances for expenses. Except as provided in section 409 [47 USCS § 409], the Commission may refer any matter arising in the administration of this Act to a joint board to be composed of a member, or of an equal number of members, as determined by the Commission, from each of the States in which the wire or radio communication affected by or involved in the proceeding takes place or is proposed. For purposes of acting upon such matter any such board shall have all the jurisdiction and powers conferred by law upon an examiner [administrative law judge] provided for in section 11 of the Administrative Procedure Act, designated by the Commission, and shall be subject to the same duties and obligations. The action of a joint board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The joint board member or members for each State shall be nominated by the State commission of the State or by the Governor if there is no State commission, and appointed by the Federal Communications Commission. The Commission shall have discretion to reject any nominee. Joint board members shall receive such allowances for expenses as the Commission shall provide.

49 U.S.C. § 16(12) provides as follows:

§ 16, par. (12). Proceedings to Enforce Orders Other Than for Payment of Money. If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured

thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same. Repealed by Act Oct. 17, 1978, P. L. 95-473, § 4(b), 92 Stat. 1466.

II. ANNOTATED CODE OF MARYLAND

Article 78

Md. Ann. Code art. 78, § 68 provides in pertinent part:

§ 68. General power of Commission; telephone company charges for directory assistance; charges based on measured time period unit rate for local messages.

(a) The Commission shall have the power to determine just and reasonable rates of public service companies, whether as maximum, minimum or maximum and minimum, respectively. The rates so determined shall be fixed by order to be served upon each public service company affected thereby. This subsection does not apply to small rural electric cooperatives.

III. CODE OF FEDERAL REGULATIONS

47 C.F.R. § 1.429 provides in pertinent part:

§ 1.429 Petition for Reconsideration

(i) The Commission may grant the petition for reconsideration in whole or in part or may deny the petition. Its order will contain a concise statement of the reasons for the action taken. Any order disposing of a petition for

reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order. Except in such circumstance, a second petition for reconsideration may be dismissed by the staff as repetitious.